

M.S., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Flushing, NY, Employer**

Appearances:

Case Submitted on the Record

Before:

JURISDICTION

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the November 23, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of total disability commencing February 17, 2017, causally related to the accepted cervical spondylosis without myelopathy.; and (2) whether appellant has met his burden of proof to establish a recurrence of total disability commencing July 17, 2017, causally related to the accepted cervical spondylosis without myelopathy.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 7, 2000 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that federal employment duties, including carrying heavy mail, caused upper back pain. His claim was accepted by OWCP for the condition of cervical spondylosis without myelopathy. OWCP thereafter accepted four recurrences of disability. In May 2006 appellant began working three-hours a day in a sedentary position.⁵

On November 17, 2013 appellant filed a notice of recurrence (Form CA-2a) claiming disability commencing October 25, 2013, alleging that he had to handle hundreds of pieces of mail causing his neck and shoulders to hurt too much to work.

By decision dated April 4, 2014, OWCP denied appellant's claim for a recurrence of total disability beginning October 25, 2013, with intermittent periods thereafter until February 20, 2014 when he again stopped work.

Appellant continued to request reconsideration of the denial of his October 25 2013 recurrence claim under OWCP File No. xxxxxx781 and his October 24, 2013 traumatic injury

⁴ Docket No. 08-2473 (issued June 10, 2009); Docket No. 16-1907 (issued August 29, 2017).

⁵ On October 2, 2007 appellant claimed a recurrence of disability (Form CA-2a), for total disability beginning August 3, 2007. On January 3, 2008 OWCP denied his recurrence claim, and an OWCP hearing representative affirmed this decision on July 25, 2008. Appellant filed an appeal with the Board, and by decision dated June 10, 2009, the Board affirmed the September 25, 2008 decision. Docket No. 08-2473 (issued June 10, 2009). Following the August 2007 recurrence claim, appellant returned to modified duty for three hours daily on September 26, 2007. OWCP adjusted his wage-loss compensation to reflect his modified duties. On August 16, 2010 it accepted a May 10, 2010 recurrence of total disability. Appellant returned to modified duty as a registry scanner for three hours a day on July 12, 2013. Thereafter OWCP paid him compensation for intermittent wage loss.

claim under OWCP File No. xxxxxx352. OWCP continued to deny modification of its prior decisions.⁶

By decision dated June 10, 2016, issued under OWCP File Nos. xxxxxx781 and xxxxxx352, OWCP determined that File No. xxxxxx352 should be adjudicated as an occupational disease claim. It found that the evidence of record was insufficient to establish causal relationship under File No. xxxxxx352. OWCP further found that none of the medical evidence submitted under either claim was sufficient to explain how employment factors caused or aggravated appellant's condition on October 25, 2013. As such, the claimed recurrence under File No. xxxxxx781 remained denied.

Appellant filed an appeal with the Board. By decision dated August 29, 2017, the Board found that appellant had not established a recurrence of total disability beginning October 25, 2013 in File No. xxxxxx781, and had not established an employment-related injury on October 24, 2013 in File No. xxxxxx352.⁷

During the pendency of appellant's appeal before the Board, appellant filed a notice of recurrence (Form CA-2a) on April 3, 2017 indicating that the recurrence occurred on February 17, 2017. He wrote that he had upper back pain and weakness. The employing establishment indicated that appellant returned to work on March 20, 2017.

Appellant had begun pain management with Dr. Jordan Sudberg, a physiatrist, in November 2015 and provided a series of his reports. In a report dated March 18, 2017, Dr. Sudberg noted that appellant was working as a mailman lobby assistant director and injured himself lifting something heavy at work which, he related, was an exacerbation of an October 24, 2013 injury caused by repetitive use of his upper extremities. He described examination findings and diagnosed "rule-out cervical disc herniation, cervical myofascial pain syndrome, and cervical radiculopathy" and concluded that, within a reasonable degree of medical certainty, the employment incident on August 1, 2000 was the competent producing cause of appellant's condition. On an attached work capacity evaluation (Form OWCP-5c), Dr. Sudberg advised that appellant could work three hours of modified duty daily with a five-pound weight restriction. On a March 18, 2017 duty status report (Form CA-17), he advised that appellant's symptoms were aggravated on October 24, 2013, and he diagnosed employment-related cervical herniated discs and left cubital syndrome, not employment related. Dr. Sudberg also submitted an attending physician's report (Form CA-20) in which he noted neck and shoulder pain and weakness, and bilateral wrist weakness. He diagnosed right shoulder impingement and right carpal tunnel syndrome. Dr. Sudberg advised that appellant could not return to work.

In a May 2, 2017 development letter, OWCP advised appellant of the factual and medical deficiencies in his April 3, 2017 recurrence claim and requested that he provide medical evidence,

⁶ On August 28, 2014 appellant filed a traumatic injury claim (Form CA-1) alleging a traumatic injury on October 24, 2013 when he put a key scanner to his shoulder and had sudden and severe shoulder and neck pain while in the performance of duty. OWCP adjudicated the traumatic injury claim under File No. xxxxxx352. On November 7, 2014 it denied appellant's traumatic injury claim in File No. xxxxxx352, finding that the evidence did not support that the injury occurred as alleged as there were significant deficiencies which cast doubt on his account of the factual events.

⁷ Docket No. 16-1907 (issued August 29, 2017).

including a well-rationalized report from his physician which explained how the accepted employment injury caused the claimed recurrence. It afforded appellant 30 days to submit the requested evidence.

Appellant submitted additional reports by Dr. Sudberg dated April 15 and May 13, 2017 in which the physician reiterated his prior findings and conclusions.

By decision dated June 16, 2017, OWCP denied appellant's April 3, 2017 notice of recurrence claim finding that he had not responded to the May 2, 2017 development letter by answering the attached questionnaire regarding how the recurrence occurred. It further found that the medical evidence from Dr. Sudberg did not provide sufficient rationale explaining how the claimed recurrent disability was employment related.

On June 27, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative.

On August 14, 2017 appellant filed an additional notice of recurrence (Form CA-2a) alleging a recurrence commencing on July 17, 2017 when he stopped work because his condition had worsened. The employing establishment attached a job offer, accepted by appellant, for a lobby monitor for four hours daily with physical requirements of sitting and verbally communicating with customers.

In a September 28, 2017 development letter, OWCP advised appellant of the factual and medical deficiencies in his August 14, 2017 recurrence claim and requested that he provide medical evidence, including a well-rationalized report from his physician which explained how employment factors caused the claimed recurrence. A questionnaire for completion was attached, and OWCP afforded appellant 30 days to submit the requested evidence.

In a report dated October 21, 2017, Dr. Sudberg provided a history that, while working as a lobby assistant, appellant injured himself lifting something heavy. He explained that appellant's symptoms continued to progressively worsen, and that on July 17, 2017 he had a spontaneous recurrence of his symptoms which caused constant neck and upper back pain associated with muscle spasms and stiffness, bilateral shoulder pain, headaches, radiating bilateral upper extremity pain with limited range of motion, and paresthesias and weakness which caused intermittent loss of dexterity. Following physical examination, Dr. Sudberg diagnosed cervical sprain/strain, cervical myalgia, cervical trigger points, cervicgia, bilateral cervical radiculopathy, and bilateral shoulder pain. He advised that appellant was totally disabled and concluded that, within a reasonable degree of medical certainty, the accident on August 1, 2000 was the competent producing cause of appellant's condition.

Appellant responded to the September 28, 2017 development questionnaire on October 25, 2017. He indicated that he had a spontaneous recurrence on July 17, 2017 and described job duties that included frequently picking up packages as requested which caused constant neck pain, muscle spasm, and radiating pain into both hands such that he could not work.

By decision dated November 13, 2017, OWCP denied appellant's claim for a July 17, 2017 recurrence finding that the medical evidence of record was insufficient to establish that the claimed recurrent disability was caused by the accepted employment injury including the condition of cervical spondylosis.

On December 4, 2017 appellant requested a review of the written record from an OWCP hearing representative following the November 13, 2017 decision.

Dr. Sudberg continued to submit monthly reports indicating that appellant suffered a spontaneous recurrence on July 17, 2017 with increased symptoms that caused him to stop work. In reports beginning January 13, 2018, he indicated that appellant's work stoppage on July 17, 2017 was solely related to the accepted cervical spondylosis without myelopathy which caused worsening neck pain, limited range of motion, paresthesias, and weakness. Dr. Sudberg related that appellant's bilateral shoulder and thoracolumbar pain were not part of the justification of his July 17, 2017 recurrence.

By decision dated March 1, 2018, a hearing representative affirmed the June 16, 2017 decision, denying appellant's April 2017 recurrence claim.

On June 28, 2018 appellant, through counsel, requested reconsideration of the November 13, 2017 and March 1, 2018 decisions.

Dr. Sudberg submitted monthly reports in which he indicated that the July 17, 2017 recurrence exacerbated appellant's original August 1, 2000 injury and caused worsening severe neck pain, limited range of motion, paresthesias and weakness. He continued to advise that appellant could not work.

By decision dated November 23, 2018, OWCP denied modification of its prior decisions finding that the medical evidence submitted was insufficient to establish either claimed recurrence.

LEGAL PRECEDENT -- ISSUES 1 and 2

A recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁸

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.⁹

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This

⁸ 20 C.F.R. § 10.5(x); *see J.B.*, Docket No. 1751 (issued May 6, 2019).

⁹ *S.H.*, Docket No. 18-1398 (issued March 12, 2019); *Terry R. Hedman*, 38 ECAB 222 (1986).

burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing February 17, 2017 causally related to his accepted cervical spondylosis without myelopathy.

At the time of the alleged February 17, 2017 recurrence, appellant did not allege a change in the nature and extent of his light-duty job requirements, rather he indicated that his employment duties caused his neck and back pain to worsen. He must, therefore, provide medical evidence establishing that he was disabled due to a worsening of his accepted work-related condition.¹¹ While counsel asserts on appeal that the medical evidence of record is sufficient to establish the February 17, 2017 recurrence, the Board finds that appellant has not submitted medical evidence to establish that he was disabled due to a worsening of his accepted cervical spondylosis without myelopathy commencing February 17, 2017.

The medical evidence submitted in support of his alleged recurrence includes numerous reports from Dr. Sudberg. The Board, however, finds his opinion of insufficient probative value to meet appellant's burden of proof to establish a February 17, 2017 recurrence of total disability. In a March 18, 2017 report, Dr. Sudberg diagnosed conditions not accepted under this claim. He referenced the alleged October 24, 2013 injury when appellant injured himself lifting something heavy at work, and the injury claim previously denied by the Board.¹² Dr. Sudberg continued to repeat this history in monthly reports.

The Board has held that the issue of disability from work can only be resolved by competent medical evidence.¹³ Whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the accepted condition and supports that conclusion with sound medical reasoning.¹⁴ Dr. Sudberg failed to provide a rationalized medical opinion that appellant's inability to work commencing February 17, 2017 resulted from the August 7, 2000 employment injury which was accepted for the condition of cervical spondylosis without myelopathy. Without a rationalized opinion as to how and why appellant's accepted conditions worsened and prevented him from performing his modified-duty

¹⁰ *Id.*

¹¹ *S.W.*, Docket No. 18-1489 (issued June 25, 2019).

¹² *Id.*

¹³ *M.B.*, Docket No. 18-1455 (issued March 11, 2019).

¹⁴ *D.J.*, Docket No. 18-0200 (issued August 12, 2019).

position during the claimed period of disability commencing February 17, 2017, the opinions expressed by Dr. Sudberg are insufficient to establish his claim for total disability.¹⁵

ANALYSIS -- ISSUE 2

The Board also finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing July 17, 2017, causally related to his accepted cervical spondylosis without myelopathy.

In a development questionnaire dated October 25, 2017, appellant alleged job duties that included picking up packages frequently that caused a spontaneous recurrence of radiating neck pain and muscle spasm. He did not allege that his light-duty, accommodated position as a lobby monitor was withdrawn by the employing establishment, nor did he provide evidence to support that he was working outside of his medical restrictions.

As previously found by the Board, the medical opinion evidence contained in the reports of Dr. Sudberg are of insufficient probative value to establish a July 17, 2017 recurrence of total disability. In reports dated August 12 and September 9, 2017, Dr. Sudberg did not mention a July 17, 2017 worsening of appellant's condition, but continued to advise that appellant's disability was due to an October 24, 2013 recurrence. It was not until the September 28, 2017 report that he specifically referenced July 17, 2017. On October 21, 2017 Dr. Sudberg noted that on July 17, 2017 appellant had a spontaneous recurrence of symptoms which caused constant neck and upper back pain associated with muscle spasms and stiffness, bilateral shoulder pain, headaches, radiating bilateral upper extremity pain with limited range of motion, and paresthesias and weakness which caused intermittent loss of dexterity. He diagnosed cervical sprain/strain, cervical myalgia, cervical trigger points, cervicgia, bilateral cervical radiculopathy, and bilateral shoulder pain, none of which have been accepted under this claim. Dr. Sudberg opined that appellant was totally disabled and concluded that, within a reasonable degree of medical certainty, the accepted August 7, 2000 employment injury was the competent producing cause of appellant's condition.

In his reports beginning on September 28, 2017, Dr. Sudberg did not provide sufficient rationale explaining the objective findings establishing a worsening of appellant's accepted condition, rather than mere worsening of his subjective symptoms.¹⁶

In assessing medical evidence, the weight of a physician's opinion is determined by the opportunity for and thoroughness of the examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁷ Contrary to counsel's assertions on appeal, Dr. Sudberg's reports were of insufficient rationale to establish a recurrence of total disability commencing July 17, 2017.¹⁸

¹⁵ V.H., Docket No. 18-0456 (issued August 9, 2019).

¹⁶ *Id.*

¹⁷ See P.S., Docket No. 18-1361 (issued May 20, 2019).

¹⁸ The Board notes that appellant continues to receive wage-loss compensation based on four hours of daily employment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing February 17 or July 17, 2017 causally related to his accepted cervical spondylosis without myelopathy.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board